Supreme Court, U.S.
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No. 02-1540

IN THE

Supreme Court of the United States

ROBIN PASSARO LOUQUE, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

1. Where the named plaintiff in a nationwide class action does not challenge the court's exercise of original jurisdiction over her claims under the court's diversity jurisdiction or the court's dismissal of her claims pursuant to Federal Rule of Civil Procedure 12(b)(6), may the named plaintiff challenge the court's exercise of supplemental jurisdiction over the claims of the absent putative members of an uncertified class before this Court?

2. Does the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorize a federal court to exercise supplemental jurisdiction over the claims of absent putative class members in a nationwide class action where the federal court has original jurisdiction over the named plaintiff's claims under the federal court's diversity jurisdiction?

STATEMENT PURSUANT TO RULE 29.6

Respondent Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

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COUNTER-STATEMENT OF THE CASE

Petitioner's claims were dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) (Pet. App. at 24a), and that dismissal was upheld after what the Fifth Circuit characterized as a "perfunctory challenge". Pet. App. at 11a. Petitioner does not challenge the dismissal of or exercise of original jurisdiction over *her* claims. Yet she asks this Court to review an issue not raised below, the Court's exercise of supplemental jurisdiction over the absent class members' claims, to resolve a conflict among the circuits.[1] Although a circuit conflict exists, this case is not the proper vehicle for the resolution because the petitioner's claims were dismissed and she now lacks standing to pursue the absent class members' claims. In addition, the issue presented was not disputed in the courts below.

This nationwide class action arises from the actions of Respondent, Allstate Insurance Company ("Allstate"), in defending its insured, petitioner Robin Passaro Louque ("Louque"), against a liability claim. In that suit, Allstate did not settle the claim before trial, the claimant obtained a judgment against Louque well within Louque's policy limits, and Allstate promptly paid the judgment without exposing Louque to personal liability. Louque nevertheless sued Allstate in Louisiana state court individually and on behalf of all Allstate policyholders nationwide and in Puerto Rico and the Virgin Islands for failing to settle the cases before trial. Louque asserted claims for breach of contract, breach of fiduciary duty, and violation of a "bad faith" statute found in the Louisiana Insurance Code.

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1. Last term, petitioner's counsel opposed a Petition For Writ Of Certiorari seeking resolution of the same issue. *Daimler Chrysler Corp. v. Gibson*, No. 01-688. Respondent's Brief In Opposition.

Allstate removed the case to federal district court, on the ground that the federal court had original jurisdiction over Louque's claims based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1), and supplemental jurisdiction over the absent class members' claims pursuant to 28 U.S.C. § 1367 and *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir.), *reh'g and suggestion for reh'g en banc denied*, 65 F.3d 33 (5th Cir. 1995). The district court thereafter granted Allstate's Motion to Dismiss the Complaint. The court held that under the Allstate insurance policy at issue, Allstate had "unfettered discretion" to decide whether or not to settle a claim, and therefore Louque failed to state a claim for breach of contract or breach of fiduciary duty. The court further found that Louque failed to state a claim under the Louisiana bad faith statute, Louisiana Revised Statute 22:1220, because the alleged wrongful act of "arbitrarily refusing to settle her claim" is not conduct "specifically prescribed by the statute."

The district court also determined that it had subject matter jurisdiction. Consistent with *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), *overruled on other grounds sub nom Tracey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), the district court looked to the named plaintiff and not the absent class members to determine original jurisdiction. Attributing to Louque the attorneys' fees that may be awarded, as permitted by Louisiana Code of Civil Procedure article 595 and *Abbott Labs*,[2] the court concluded

2. In *Grant v. Chevron Phillips*, 309 F.3d 864 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1634 (2003), the Fifth Circuit revisited *Abbott Labs* and reaffirmed that under Louisiana Code of Civil Procedure article 595, where a fee shifting statute is implicated in a class action, all attorney fees shall be aggregated and attributed to the named

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that because Louque "intends to represent a nationwide class of 'tens of thousands, if not hundreds of thousands of individuals' and seeks both damages and penalties for each class member," "Louque's attorneys' fees will easily exceed the jurisdictional threshold," thereby establishing original jurisdiction over Louque's claim. Following *Abbott Labs*, the court exercised supplemental jurisdiction over the absent class members' claims under Section 1367, *without objection from Louque.*

The Fifth Circuit affirmed in all respects. Noting that "Louque's challenge to the dismissal of her case is perfunctory," and "may not even pass muster under the minimum criteria that was required for a reasoned, record-based presentation of a party's position," (Pet. App. at 11a) the appellate court agreed with the district court's conclusion that Louque failed to state a claim for breach of contract and breach of fiduciary duty. Pet. App. at 12a-13a. The court further found "as Louque did not argue the merits of her bad faith claims on appeal, they are waived." *Id.* at 11a. The Fifth Circuit also agreed that the district court had original jurisdiction over Louque's claim, and "through its exercise of supplemental jurisdiction, jurisdiction over the claim of the class," citing Section 1367 and *Abbott Labs. Louque did not argue on appeal that the exercise of supplemental jurisdiction was improper under Section 1367.*

Louque does not challenge here the court's dismissal of or exercise of original jurisdiction over her claims.

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plaintiff. The court then held that even in the absence of a fee shifting provision, pursuant to Louisiana Code of Civil Procedure article 595, attorney fees are attributable to the class representatives for purposes of calculation of the amount in controversy.

She challenges only the exercise of supplemental jurisdiction under Section 1367 over the claims of the putative class, an issue not argued below.

REASONS TO DENY THE PETITION

1. Louque Lacks Standing To Pursue The Absent Class Members' Claims.

The Fifth Circuit affirmed dismissal of Louque's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As found by the Fifth Circuit, Louque failed to state a claim for breach of contract or breach of fiduciary duty because the policy gives Allstate "unfettered discretion in deciding whether to settle cases" and "Louque waived her claims under [the Louisiana Insurance Code] on appeal, by not arguing the merits." Pet. App. at 11a-12a. In so ruling, the Fifth Circuit noted that "Louque's challenge to the dismissal of her case is perfunctory;" cites no case law, and "may not even pass muster under the minimum criteria that we require for a reasoned, record-based presentation of a party's position." *Id.* at 11a.

Louque does not dispute here that the federal court had original jurisdiction over her individual claims and does not complain about dismissal of those claims. Accordingly, the judgment dismissing her claims is now final. Since Louque no longer can sue in her own right, she is not eligible to pursue claims for the class. This Court has long recognized that a plaintiff must have a live controversy to be eligible to pursue claims on behalf of an uncertified class.

> There must not only be a named plaintiff who has such a case or controversy at the time the

> complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time [the Supreme Court] reviews the case.

Sosna v. Iowa, 419 U.S. 393, 402 (1975). *See, e.g., Board of School Comm'rs v. Jacobs*, 420 U.S. 128 (1975) (finding moot a case where named plaintiffs no longer had a claim and class was not certified). The circuit courts are in step, consistently holding that a class representative without live claims cannot represent an uncertified class. *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992) (named plaintiff can appeal adverse decision on certification only if at the time the certification decision was rendered the plaintiff had a live claim); *Rocky v. King*, 900 F.2d 864, 866 (5th Cir. 1990) (controversy posed by plaintiff's complaint must be live throughout litigation process); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970). ("[A] predicate to [a plaintiff's] right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class."), *cert. denied*, 401 U.S. 974 (1971).

Here, prior to certification Louque's claims were dismissed pursuant to Rule 12(b)(6). And, Louque does not contest that dismissal. Since Louque no longer can sue in her own right, she may no longer pursue claims on behalf of the class. Accordingly, Louque lacks standing to pursue the absent class members' claims.

2. This Case Is A Procedurally Inappropriate Vehicle For Considering Whether § 1367 Overrules *Zahn*.

The circuits undoubtedly are split regarding whether 28 U.S.C. § 1367 partially overrules *Zahn v. International Paper Company*, 414 U.S. 291 (1973) and provides supplemental jurisdiction in diversity cases over claims of absent class members whose claims may not satisfy the amount in controversy requirement. But this case is a procedurally inappropriate vehicle for resolving the conflict.

Louque did not contest that the district court had jurisdiction under Section 1367 over the absent putative class members' claims in either the district court or the Fifth Circuit. The issue neither was briefed nor argued in the courts below and only is summarily referred to in passing in the Fifth Circuit's decision. This Court, thus, is being asked to consider an issue not litigated below.

And, the request is made by a party whose claims were dismissed on the pleadings after she mounted a "perfunctory challenge" to the district court's dismissal of two claims and abandoned another on appeal.[3] As a result, even if Louque were to prevail on the *Zahn* issue, her claims are not revived. Rather, the result would be a "headless" class action suit that is remanded to proceed without a class representative.

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3. Louque's failure to launch even a meager defense against dismissal of her claims on the merits is tantamount to a concession as to the groundless nature of her claims. If Louque did not believe her claims were worthy of more than a perfunctory defense, then surely the case is not worthy of review by this Court.

3. The Fifth Circuit Correctly Held That The District Court May Exercise Supplemental Jurisdiction Over The Absent Class Members' Claims.

Louque does not challenge that the federal court had original jurisdiction over her claims under 28 U.S.C. § 1332. Instead, and for the first time, she contends that the federal court should not have exercised supplemental jurisdiction over the absent class members' claims. Although the issue has never been briefed or argued in this case, Louque asks this Court to review the issue to resolve a circuit conflict.[4]

Louque's argument should be rejected because the lower courts' decisions are correct. As held by the Fifth Circuit below as well as the Fourth, Seventh and Ninth Circuits, the plain meaning of the text of Section 1367 permits a court to exercise supplemental jurisdiction over absent class members' claims even when those claims do not all meet the amount in controversy requirement. *Rosmer v. Pfizer, Inc.*,

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4. Despite the circuit conflict, this Court refused in this term and last to consider the same jurisdictional issue in cases that had not been dismissed or were more worthy of review. In each instance, this Court denied certiorari. In *Grant v. Chevron Phillips Chemical Company*, 309 F. 3d 864 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1634 (2003), for example, defendants removed to federal court from a Louisiana state court a class action involving only Louisiana class members and Louisiana state law claims. Like here, the district court in *Grant* exercised supplemental jurisdiction over the absent class members' claims. Although the issue was present, this Court denied certiorari. Similarly, last term the Court considered *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001), where the Ninth Circuit held that Section 1367 allows a federal court to exercise supplemental jurisdiction over absent class members' claims and overrules *Zahn* and the issue was raised in the Petition For Writ Of Certiorari. The Court nevertheless denied certiorari. 534 U.S. 1104.

263 F.3d 110 (4th Cir. 2001) (Section 1367 confers federal jurisdiction over absent class members whose claims do not satisfy the jurisdictional amount), *cert. dismissed*, 536 U.S. 979 (2002); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (Section 1367 allows the court to exercise supplemental jurisdiction over absent class members' claims), *cert. denied*, 534 U.S. 1104 (2002); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) (court may exercise supplemental jurisdiction). Those courts correctly construed the plain text of Section 1367. Section 1367 provides:

> (a) Except as provided in subsection [ ](b) . . . , in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule

> 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

The first subsection broadly authorizes federal courts, in any civil action of which they have original jurisdiction to exercise supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." *Id.* Pursuant to subsection (a), so long as there is a claim within a district court's original jurisdiction, the court has supplemental jurisdiction "over all other claims" that are transactionally related.

The second subsection carves out specific exceptions to the broad grant of supplemental jurisdiction authority in diversity cases but Rule 23 is absent from the list of specific exceptions. Because the putative class members' claims fall within the first subsection but are not carved out by the second subsection, the Fifth Circuit properly concluded that the class claims fell within the statutory scope of supplemental jurisdiction.

Louque, however, insists that class actions do not involve assertions of supplemental jurisdiction and, therefore, Section 1367 does not apply. (Pet. App. at 10). According to Louque, before supplemental jurisdiction can be exercised, the court must have "original jurisdiction" over the *entire* civil action, that is, over the claims of the named plaintiff and all absent class members.[5] This argument ignores the statutory

5. For Louque's argument to be correct, the term "original jurisdiction" in subsection (a) necessarily will mean something different in diversity and federal question jurisdiction. This Court (Cont'd)

language and renders supplemental jurisdiction superfluous. "The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 167 (1997). If the statute required original jurisdiction over all claims in the "civil action," then, by definition, there would be no "other claims" over which to exercise supplemental jurisdiction.

Not only is Louque's argument at war with the statute's plain language, it also conflicts with this Court's precedent. Louque's argument that the court must have original jurisdiction over the absent class members' claims was rejected long ago by this Court in *Supreme Tribe of Ben Hur*, 255 U.S. 356 at 366. There, the Court held that the requirement of complete diversity of citizenship in class actions is assessed solely by reference to the citizenship of the named plaintiffs, not the absent class members. Thus, since 1921, this Court has recognized that original jurisdiction does not have to exist over the claims of both the named plaintiff and all absent class members.

If diversity of citizenship is not required for each absent class member, logic dictates that each absent class member likewise is not required to satisfy the other prong of original jurisdiction, the amount in controversy.[6] The district court

(Cont'd)

has long held that in a federal question case, there need not be subject matter jurisdiction over all the claims in the complaint for there to be "original jurisdiction" within the meaning of subsection (a). *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (where Court has subject matter jurisdiction over federal claim, court may exercise pendent jurisdiction over state law claim).

6. Practical considerations support this result. If each absent class member's claim had to satisfy the amount in controversy

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and Fifth Circuit decisions here merely treat the prongs of original jurisdiction symmetrically.

Recognizing that a federal court may exercise supplemental jurisdiction over absent class members' claims also is "conducive to the administration of justice."[7] This Court recently held another subsection of Section 1367 constitutional because, *inter alia*, "[i]t eliminates a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal and state law claims, that (derive from a common nucleus of operative facts)," and therefore is "conducive to the administration of justice." *Jinks v. Richland County, S.C.*, 123 S. Ct. 1667, 1671 (2003) (discussing Section 1367(d)). Construing Section 1367 to allow the exercise of supplemental jurisdiction over absent class members likewise is "conducive to the administration of justice" because it allows parties to pursue in federal courts all claims arising out of a common nucleus of operative facts.

(Cont'd)
requirement, then defendants would be entitled to jurisdictional discovery from absent class members, a result at odds with traditional discovery rules.

7. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819).

CONCLUSION

Louque's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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